

THE CARBON SEQUESTRATION COUNCIL

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Washington, DC 20004-1312

August 31, 2012
Delivered via electronic mail

Ann M. Codrington, Director
Drinking Water Protection Division
Office of Ground Water and Drinking Water
1200 Pennsylvania Avenue, NW (MC-4607M)
Washington, DC 20460

Re: Request for Reconsideration and Revision of the Class VI Well Construction Guidance

Dear Director Codrington:

The Carbon Sequestration Council (CSC) commends the Office of Ground Water and Drinking Water (OGWDW) for the substantial improvements to the Draft Underground Injection Control (UIC) Program Class VI Well Construction Guidance (issued July 30, 2012) that have been made in response to the comments received from the CSC and others. We appreciate the many improvements that were made. We are seriously concerned, however, that an entirely new Section 3 entitled "Considerations for Conversion of Other Well Types to Class VI" has been included in what is described as the "final" Well Construction Guidance without providing an opportunity for comment on the new material included within that section. Our serious concerns about that new material stem from the fact that it contains statements that appear to be presented as statutory or regulatory requirements but could only be intended as recommendations or suggestions because those items are not requirements of the Class VI rule. Accordingly, we are requesting that the Environmental Protection Agency (EPA) reconsider and revise the Class VI Well Construction Guidance that was published on July 30, 2012 to correct those statements in particular.

CSC is a multi-industry association formed to provide a forum for inter-industry communication around key issues of carbon capture and sequestration (CCS) including policy, funding, and messaging. CSC facilitates information sharing and consensus building to more effectively promote policies, legislation and regulatory frameworks that foster the use of anthropogenic CO₂ for enhanced oil recovery (EOR) as well as the early use and commercial deployment of geologic sequestration (GS) as a means of addressing greenhouse gas mitigation. Members of the Carbon Sequestration Council include American Electric Power, BP Alternative Energy, ConocoPhillips, Denbury Resources Inc., Duke Energy, LG&E and KU Energy LLC, Occidental Petroleum Corporation, Shell Exploration & Production Company, and Southern Company.

The interest of CSC in, and our concerns about, the new material in Section 3 of the revised Well Construction Guidance stem from the fact that a number of our members operate Class II underground injection wells used for enhanced oil recovery (EOR) through injection of carbon dioxide, and some of those Class II wells may in the future be considered for transition to Class VI wells. Other of our member companies are currently engaged in research, development and deployment projects that will involve the capture and transportation of carbon dioxide to oil fields where the carbon dioxide will – or could in the future – be used for EOR. Therefore, the requirements that would apply to the repermitting of those wells are matters of the utmost importance to our member companies.

The final Class VI rule was very appropriately clear and flexible in allowing the repermitting under Class VI of existing wells that “were engineered and constructed” to fully protect underground sources of drinking water (USDWs) and to “[p]revent the movement of fluids into or between USDWs or into any unauthorized zones” while allowing required testing, maintenance and monitoring pursuant to section 146.86(a) of the rule. 40 CFR §146.86(a). Yet, the “final” Well Construction Guidance appears to impose additional mandatory requirements that are not prescribed by the rule and could serve to disqualify substantial numbers of wells that are in full compliance with the Class VI regulations and would provide all of the necessary protections for USDWs..

The “Disclaimer” on page *i* of the Well Construction Guidance explains the use of terminology in the document as follows:

The Safe Drinking Water Act (SDWA) provisions and EPA regulations cited in this document contain legally-binding requirements. In several chapters this guidance document makes recommendations and offers alternatives that go beyond the minimum requirements indicated by the Class VI Rule. This is done to provide information and recommendations that may be helpful for Class VI Program implementation efforts. Such recommendations are prefaced by the words “may” or “should” and are to be considered advisory. They are not required elements of the Class VI Rule.

Conversely, however, the public will conclude from this that statements in the Well Construction Guidance that are prefaced by the words “must” or “required” are required elements of the Class VI rule. The new Section 3 presents a number of “must” statements that are not required elements of the Class VI rule. For example, the Well Construction Guidance presents this statement on page 37: “To demonstrate zonal isolation, an owner or operator must demonstrate, at a minimum, that the surface casing has intact cement from the bottom of the lowermost

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USDW to the surface.” Yet this is not a required element of the Class VI rule. Similarly, although the Well Construction Guidance states on page 37 that “the long-string casing must be cemented from the production zone into the confining layer”, the regulations do not in fact contain this requirement.

By using mandatory terminology in these statements, the Guidance is not in fact providing guidance to UIC Program Directors, but rather would impose additional mandatory directives that a well lacking these elements cannot be re-permitted by a UIC Program Director as a Class VI well even where the well complies with the applicable requirements of sections 146.81(c) and 146.86(a). Accordingly, in its present form, the “final” Class VI Well Construction Guidance fails to describe accurately “the construction, testing, and operating requirements for an approved Class VI injection well” as it is intended to do. Therefore, the document must be revised to correct these errors.

Courts have recognized the key role that guidance documents can play in the implementation of EPA regulations.^{1/} To avoid any potential misunderstanding and misapplication of the statements in Section 3 of the “final” Class VI Well Construction Guidance, we request that the document be revised to correct the errors noted in the attached detailed comments on the revised document.

In addition, we have noted a number of other revisions that should be made along with these necessary corrections. For example, in its response to comments on the draft Class VI Well Construction Guidance, EPA stated in response to a CSC comment about the document’s description of the surface casing as the casing with the largest diameter: “EPA clarifies that a conductor casing, if used, would be larger.”^{2/} Yet, this clarification does not appear in the “final” Class VI Well Construction Guidance as EPA’s response indicated it would. We have recommended a revision to provide this clarification as intended by EPA.

^{1/} See *National Mining Ass’n v. Jackson*, Civil Action No. 10-1220 (RBW), slip op. at 17 (D.D.C. 2012), citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000): “the following language from Appalachian Power aptly describes the Final Guidance in this case”: “[W]hatever [the] EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency’s settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.”

^{2/} EPA, Underground Injection Control (UIC) Class VI Program: Summary of EPA’s Responses to Public Comments Received on the Class VI Well Construction Guidance at 9 (May 2012).

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We continue to have concerns about the annulus pressure requirement of section 146.88(c) which imposes a default requirement for an “annulus a pressure that exceeds the operating injection pressure” unless this might “might harm the integrity of the well or endanger USDWs”. We have expressed this concern before, and we appreciate the way in which the rule and guidance have noted the ability of a UIC Program Director to modify this requirement as necessary to accommodate the need to protect well integrity while preventing endangerment of USDWs. With the addition of Section 3, it is particularly important to recognized that requirements such as section 146.88(c) come with authorizations of flexibility that can be exercised by the UIC Program Director when necessary to preserve well integrity while protecting USDWs and that such flexibility would be particularly appropriate to be exercised for existing wells. We have suggested revisions to accomplish this clarification.

Our other recommended revisions would correct typographical and other errors in the text and would further clarify revisions to the Class VI Well Construction Guidance. For each recommendation, we have provided the current language from the Guidance, additional information that forms part of the basis for the recommendation, a recommended revision, and a comment that explains the importance of the requested revision. Although we have tried to make these explanations sufficient, we would be happy to provide additional information.

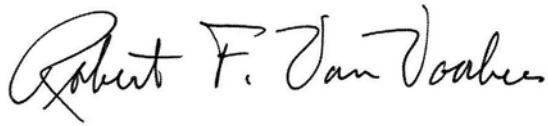
The CSC anticipates that the Agency did not intend for the revised Guidance document to impose requirements that are not in fact required by the regulations. The CSC cannot, however, rely upon such mere anticipation, given the importance of the errors that appear in the new Section 3 of the “final” Class VI Well Construction Guidance in particular. Accordingly, in order to protect its ability to seek judicial review of these changes, should it become necessary, the CSC respectfully requests that EPA provide by Tuesday, September 11, 2012 at the latest a legally binding statement in the form of a tolling agreement that the Agency will not assert or support any time bar defense under section 1448(a) of the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-7(a), at any time before the date forty-five (45) days after the Agency takes and provides to the undersigned actual notice of final action to either grant or deny the requests for reconsideration and revision of the Class VI Well Construction Guidance presented in this letter and the attached detailed comments and recommendations. Absent such a statement and agreement, the CSC may find it necessary to file a protective petition for review of the Class VI Well Construction Guidance in an appropriate United States court. We would prefer to avoid having to take that step.

We appreciate the opportunity we had to comment on the Draft Class VI Well Construction Guidance and the improvements made in response to the comments provided by the CSC and others. In addition, we appreciate the opportunity to meet with you on September 10 to discuss

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this request. We want to continue working with you to improve and finalize that Class VI Well Construction Guidance and the other guidance documents being developed for the UIC geologic sequestration program. If you have any questions or need any additional information about this request for reconsideration and the attached comments and recommendations, please contact me at 202-508-6014 or at my email address bobvanvoorhees@carbonsequestrationcouncil.org.

Respectfully submitted,

A handwritten signature in black ink, reading "Robert F. Van Voorhees". The signature is written in a cursive, flowing style.

Robert F. Van Voorhees, Manager
Carbon Sequestration Council

cc: Bruce Kobelski, UIC Program, Drinking Water Protection Division
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